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No. 85-1406

In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In our petition, we demonstrated that the court of appeals' rule requiring, save in rare cases, the issuance of an injunction upon the showing of a likely violation of an environmental statute, is contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), as well as decisions from other circuits. We also showed that the court's extension of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, to the waters above the outer continental shelf (OCS) contravened congressional intent and threatened seriously to disrupt leasing and development of the OCS offshore Alaska. We also explained that, even if Section 810 applies to the OCS, the court's refusal to allow leasing and exploration to proceed until the Secretary complied with Section 810's procedural requirements for *all* stages of the OCS program, including development and production, conflicts with *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). Finally, we showed that the court er-

roneously applied its construction of Section 810 retroactively, enjoining a lease sale that occurred, without litigation challenge, six months before the court first announced its reading of Section 810.

As we shall now explain, respondents have not offered any persuasive reason why these issues do not warrant this Court's review.

1. Respondents argue (Br. in Opp. 18-22) that the Secretary cannot contest the validity of an injunction that the lower court issued "at the Secretary's * * * behest," and that, in all events, the court of appeals' decision to issue an injunction was based on traditional criteria and not a per se injunction rule. Respondents mischaracterize both the Secretary's position and the court of appeals' ruling.

First, the Secretary never "requested" an injunction. Exploratory drilling in the Sale 57 area began in the summer of 1984, before *Gambell I* was decided (Pet. 4-5). Respondents never challenged the Secretary's approval of the exploration plans (pursuant to 43 U.S.C. 1349(c)), nor did they ask the court of appeals to enjoin that drilling pending appeal. The issues before the court in *Gambell I* related only to the lease sale itself. It was in that context that the Secretary contended that, even if a violation of Section 810 had occurred, "there is no need to undo what has already been done[] [t]he proper role for the court is simply to maintain the status quo while the Secretary does whatever is necessary to comply' " (Pet. App. 3a). Accordingly, the Secretary was not "requesting" an injunction, but merely arguing against rescission of the sale. The "status quo" at the time, moreover, included exploratory drilling and, consequently, maintaining the status quo would not have called for enjoining such drilling. And, of course, even if an injunction had been "requested" in *Gambell I*, any such request would have no bearing on Lease Sale 83, which was not challenged until after *Gambell I*. The scope of the court of appeals' injunction, however, is not limited to Sale 57.

Second, the court of appeals' decision in *Gambell II*, directing the district court to enjoin all activities in connection with both Sale 57 and Sale 83, does not, in any event, purport to rest on any "request" by the Secretary,[1] but relies instead on application of the court's own criteria for evaluating a claim for injunctive relief. Respondents' effort to rewrite the court of appeals' analysis —to suggest that the lower court simply applied traditional equitable criteria—is unavailing. Contrary to respondents' contentions, the court's ruling neither flowed from the failure of petitioners "to show any irreparable harm" (Br. in Opp. 22) nor considered the likelihood of a statutory violation as a mere factor to be taken into account "in determining whether injunctive relief is appropriate in a given case" (*id.* at 21).

As the district court found (Pet. App. 43a), the Secretary made ample showing that injunctive relief would cause "irreparable harm" to a national program of great importance to Congress: "this nation's quest for new oil resources and energy independence" (*ibid.*). Respondents' contention (Br. in Opp. 21) that the Secretary "stood silent" and "never claimed he would suffer any harm" misstates the record. The Secretary identified two types of irreparable harm that an injunction would cause: (1) irreparable harm to efforts under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. II) 1331 *et seq.*, to assess expeditiously the extent of oil and gas resources offshore Alaska; and (2) irreparable harm to efforts to gather geological information necessary for planning the next lease sale in Norton Sound. See Fed. Defs. Opp. to Plaintiffs' Mot. for Preliminary Injunction, Fed. Appellees Br. 44-47, *Gambell II*.

The court of appeals' refusal to give weight to these legitimate and weighty concerns stemmed from its appli-

[1] The court of appeals refers to the Secretary's brief only in its recitation of the facts (Pet. App. 3a). The court nowhere mentions the brief in its analysis of the legal question whether injunctive relief is appropriate (see *id.* at 6a-21a).

cation of a test for injunctive relief which is contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). In the court of appeals' view, a likely violation of an environmental statute is not merely another factor that "must be considered" (Br. in Opp. 21), but rather creates a presumption that an injunction must issue (see Pet. 10; Pet. App. 15a). Hence, the court of appeals faulted the district court for denying injunctive relief because, having found that there was a strong likelihood that the Secretary had violated Section 810, the district court had a "duty to issue an injunction" (Pet. App. 15a). The court of appeals stressed that only in "unusual circumstances" could this duty be "excuse[d]," citing as examples "irreparable harm *to the environment*" or "interfer[ence] with a long-term contractual relationship" (*id.* at 15a, 16a, 17a (emphasis in original)). Thus, contrary to respondents' characterization (Br. in Opp. 21), the court of appeals' opinion belies any suggestion that the court engaged in a balancing of the equities, as required by traditional standards for injunctive relief. Rather, "the law in th[e Ninth C]ircuit" permits a weighing of the equities in the face of a statutory violation only when certain "unusual" or "rare" circumstances are present (Pet. App. 15a).[2]

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[2] In a belated effort to deny the court of appeals' express rationale, respondents (Br. in Opp. 20) and the State of California as amicus curiae (Br. 4) seize upon the court's isolated statement (Pet. App. 21a) that "[t]he by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans." The court of appeals, however, clearly did not base its ruling on any such unsupported factual finding. As we pointed out in our petition (Pet. 16), the Secretary made explicit findings, never challenged by respondents, that exploration would not significantly restrict subsistence resources in the two sale areas. Indeed, as the court of appeals recognized (Pet. App. 15a), the district court's decision not to issue an injunction was based, in part, on its finding "[t]hat exploration will not significantly restrict subsistence resources" (*ibid.*). The court of appeals did not overturn this finding as clearly erroneous (the record certainly would not have supported such action), but

Indeed, a more recent Ninth Circuit decision eliminates any possible remaining doubt concerning the operation of the court's per se injunction rule. In *Tribal Village of Akutan* v. *Hodel*, No. 86-3512 (Apr. 28, 1986) (reprinted in App., *infra*, 1a-7a), involving Lease Sale 92 offshore Alaska, the court of appeals affirmed the district court's conclusion that "an injunction was required as a matter of course under *Gambell II*" once complaining parties "had established a strong likelihood of success on their ANILCA claim" (App., *infra*, 3a). The court of appeals made entirely clear that the Secretary's unchallenged findings in that case that subsistence restrictions were "unlikely" was of no relevance to the question whether an injunction should issue (*id.* at 3a, 7a): "Absent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA section 810(a)" (*id.* at 4a (citing *Gambell II*)).

2. Respondents make no attempt to refute our showing (Pet. 22-25) that the "public lands" subject to Section 810 do not include the OCS.[3] Respondents argue

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instead ruled that the lack of harm did not qualify as an "unusual circumstance" excusing the mandatory issuance of an injunction (*ibid.*). California also errs in contending (Am. Br. 7) that the court of appeals' ruling could alternatively be justified under the District of Columbia Circuit's "'opportunity to choose'" rule for injunctions. Applying that rule (Pet. App. 43a (citation omitted)), the district court properly *denied* respondents injunctive relief, and the court of appeals flatly rejected that rule in favor of its own standard (Pet. App. 17a).

[3] Nor are respondents correct in claiming (Br. in Opp. 9-10) that the United States has taken inconsistent positions on this point in *Gambell* and *Inupiat*. The United States did *not* rely in *Inupiat* on the argument that the phrase in Alaska "clear[ly] and unambiguous[ly]" mandated application of ANCSA to the OCS. Instead, we relied, inter alia, on the language of Section 4(b) of Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b), which expressly extinguished claims to "submerged land underneath all water areas, both inland and offshore." See Fed. Def. Reply Mem. in Support of Motion for Judgment on the Pleadings 22-23; see also Br. in Opp. at 34 & n.22, *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1301 (Oct. 7, 1985).

(Br. in Opp. 12-15) instead that certiorari should be denied because the case is unimportant. That characterization is not easily reconciled with respondents' own repeated emphasis of the crucial importance of the natural resource at stake (*id.* at 2, 3, 4, 5) and, more importantly, their specific admission that the effect of the court of appeals' ruling will be to delete certain tracts from leasing and generally delay OCS leasing in Alaska (*id.* at 13). As we outlined in our petition (at 20-21), the adverse rulings put at risk the 621 leases issued offshore Alaska since the enactment of ANILCA, threatening the loss of more than $4.2 billion in bonuses received for those leases. Indeed, respondents even suggest that lessees might argue for recovery of their bid money (Br. in Opp. 13). Respondents may believe that such adverse effects on OCS leasing and exploration are a sound idea (*id.* at 14), but Congress has seen fit to declare that assessment of the extent of energy resources located on the OCS is to be achieved "at the earliest practical time" with "expeditious" development. See 43 U.S.C. 1802(9), 1332(3).

Respondents err in charging (Br. in Opp. 9, 10) that the Secretary has "ignore[d]" or "refus[ed] to consider" subsistence in planning lease sales. The Secretary extensively analyzed subsistence restrictions in the final environmental impact statement prepared for Sale 57, the thoroughness of which is evident in respondents' repeated references to the document in their own discussion of subsistence effects (*id.* at 4-5 nn.10, 11, 13, 14, 15). The final EIS for Lease Sale 83 similarly contains an extensive discussion of subsistence, even though no Native subsistence harvesting occurs in the Navarin Basin (see Pet. 7). The district court specifically found that "the Secretary considered the relevant factors" under Section 810 (Pet. App. 42a; see also *id.* at 37a), albeit not with the mandate of the statute "clearly in mind" (*id.* at 38a). And since *Gambell I*, the Secretary has been conducting subsistence analyses under the express terms of Section 810, including Section 810 analyses for

each new exploration plan (see, *e.g.*, Pet. App. 107a), and a Section 810 subsistence reevaluation for Sale 57 (Pet. App. 81a-106a).

Notwithstanding the Secretary's extensive efforts to comply with Section 810 on the OCS, the courts have now blocked activity in three lease sale areas offshore Alaska, including Sale 57 and Sale 83 in *Gambell II* and Sale 92 in *Akutan*, based on extremely expansive readings of that provision. Having successfully urged upon the court below the expansive and strict reading of Section 810 upon which these rulings lie, respondents are hardly in a position to claim now that the Secretary "should encounter few problems in complying with" that provision (Br. in Opp. 14).

3. Respondents mischaracterize (Br. in Opp. 22-23) our contention that the decision below is inconsistent with this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). The issue we present is not, as respondents put it (Br. in Opp. 23), "whether any compliance effort is required at the leasing stage." The Secretary expressly recognizes that, if ANILCA applies to the OCS, a Section 810 evaluation is necessary at the leasing stage to determine whether significant restrictions on subsistence will then occur. For this reason, after *Gambell I* issued, the Secretary prepared a leasing stage subsistence re-analysis for Sale 57 (Pet. App. 81a). The court of appeals rejected the Secretary's analysis, however, because it disclosed possible subsistence restrictions at the production and development stage, but did not carry out the second tier hearing and findings procedures of Subsections (a)(1)-(3) (Pet. App. 13a-14a). Our petition quite plainly challenges the court's holding that Section 810 requires a hearing and findings at the leasing stage even when the Secretary has found that any possible effects will be confined to the production and development stage.[4] By focusing on a non-issue, respond-

[4] The problems posed by this holding are now even more acute due to the Ninth Circuit's ruling in *Akutan* that the procedures of

ents fail to rebut our showing of a conflict with this Court's holdings in *Secretary of the Interior* v. *California*, *supra*, that "[e]ach stage [of the OCS process] involves separate regulatory review * * *," and that Congress instituted staged consideration "to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production" (464 U.S. at 337, 341 (footnote omitted)).[5]

4. The majority in *Gambell II* acknowledged that *Gambell I* had "established a new principle of law," but concluded that "retroactive application of *Gambell I* would further the operation of the statute * * *," and would not lead to "substantial inequitable results" (Pet. App. 24a). In our petition (at 27-28) we showed why retro-

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Subsection (a)(1)-(3) must be carried out at the leasing stage even when the Secretary has specifically found that significant restrictions on subsistence uses are " 'unlikely' " at the production and development stage (App., *infra*, 7a).

[5] Cases respondents cite (Br. in Opp. 23) support our contention that compliance with environmental laws should be judged in light of the multi-stage structure of the OCSLA. See *Village of False Pass* v. *Clark*, 733 F.2d 605, 608-609, 610-612, 614-616 (9th Cir. 1984) (upholding Secretary's reliance on future opportunities to comply with NEPA and Endangered Species Act at later OCS stages); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 595 (D.C. Cir. 1980) ("a purpose of OCSLA is to permit an expedient resolution of preliminary matters in the development of oil lands while preserving administrative and judicial review for future times when potential threats to the environment are readily visualized and evaluated"); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 714-715 (1st Cir. 1979) (rejecting Endangered Species Act challenge to lease sale based on Secretary's reserved powers to enforce that Act at later stages); *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (rejecting lease sale NEPA challenge based on Secretary's ability to gather information and modify OCS project at future stages); *Sierra Club* v. *Morton*, 510 F.2d 813, 828 (5th Cir. 1975) (same). To the extent that respondents cite these cases for the proposition that the Secretary must, at the lease sale stage, take an overview of possible subsistence impacts at later stages, the Secretary has clearly already done so (see, *e.g.*, Pet. App. 85a-106a).

active application of *Gambell I* to a lease sale area where no Native subsistence occurs, and where Interior had already studied the subsistence issues, served no possible purpose (see also Pet. App. 31a-32a (Dimmick, J., dissenting)). Respondents make no attempt to rebut this point, but instead argue (Br. in Opp. 24-25) that the majority erred in characterizing its result as retroactive. Respondents do not deny that *Gambell I* was a novel interpretation of Section 810. Instead, they contend that there is nothing retroactive about applying the rule of *Gambell I* to a lease sale which took place after the complaint in *Gambell I* was filed, but before the novel construction of Section 810 was announced.

Respondents have apparently mistaken the inquiry whether a rule should be applied retroactively for the threshold issue whether a particular construction is, in fact, retroactive. With regard to the threshold question, there can be no serious doubt that applying *Gambell II* to Lease Sale 83 amounts to a retroactive application, as the court of appeals itself recognized. With respect to the distinct issue respondents appear to be addressing, surely the Secretary and the companies were justified in proceeding with Lease Sale 83 when no one had challenged *that* sale (which took place in an area not used for Native subsistence), and when the district court in the Sale 57 case had recently upheld the Secretary's interpretation that Section 810 did not apply to the OCS (see Pet. App. 32a (Dimmick, J., dissenting)).

5. Finally, respondents argue (Br. in Opp. 15-17) that the petition is untimely. In particular, respondents argue that the Secretary was required to re-argue the non-applicability of Section 810 to the OCS on remand following *Gambell I* in order to preserve the issue for this Court's review (Br. in Opp. 16-17). This contention is totally unsupported by the Court's precedent and would invite both premature filings in this Court and wasteful arguments in the lower courts. As we have previously noted (Pet. 22 n.11; 85-1608 Br. in Opp. 10

n.5), the decision in *Gambell I* expressly remanded questions regarding the scope of the Secretary's ANILCA responsibilities to the district court. Hence, unlike the court's ruling on aboriginal title, the ANILCA ruling was clearly interlocutory in nature and review by this Court is still timely. See, *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973); *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 316 (6th ed. 1986).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, together with the petition in No. 85-1239, and the two cases consolidated for purposes of oral argument.

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Acting Solicitor General *

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[6] Although the Secretary was not obligated to relitigate the threshold ANILCA issue, we note that the Secretary never abandoned his position that Section 810 was inapplicable to the OCS, both in his Section 810 compliance documents prepared after *Gambell I* (see Pet. App. 82a) and in the brief before the court of appeals in *Gambell II* (see Br. 9 (noting that certiorari had not previously been sought because the ruling in *Gambell I* was interlocutory and that the Secretary adhered to the view that ANILCA did not apply to the OCS)).

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3512/86-3514/86-3517

DC Nos. CV-A85-701-V
CV-J85-037-V
CV-J85-038-V

TRIBAL VILLAGE OF AKUTAN, ET AL.,
PLAINTIFFS-APPELLEES

vs.

DONALD P. HODEL, ET AL.,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted March 14, 1986
[Filed Apr. 28, 1986]

MEMORANDUM*

Before: DUNIWAY, GOODWIN, BRUNETTI, Circuit Judges

In this consolidated appeal, appellants Secretary of the Interior, ten oil companies, and others, seek review of a district court order granting a preliminary injunction restraining the Secretary from proceeding with Lease Sale 92 in the North Aleutian Basin. We affirm.

I. BACKGROUND

Lease Sale 92 is proposed as part of the Department of Interior's current five-year offshore oil and gas leasing program, established under section 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344. In preparing for the Sale, the Secretary was required to conduct an evaluation of the effects of the sale on subsistence uses and resources pursuant to section 810(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120(a). Section 810(a) can be described as consisting of two tiers, the first requiring an evaluation, and the second, under the appropriate circumstances, requiring notice, hearings, and minimization of adverse impact upon subsistence uses and resources.

The Secretary conducted an evaluation pursuant to the first tier of section 810(a), but based on his finding that significant subsistence restrictions were "unlikely," declined to undertake the second tier procedures of noticed hearings and mitigation of environmental harm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Following the Secretary's announcement in December 1985, of his decision to go forward with Lease Sale 92, appellees the State of Alaska, Trustees for Alaska, the Tribal Village of Akutan, and others, filed suit in federal district court. The parties sought a preliminary injunction against the receipt and opening of bids based on violations of ANILCA and other statutes.[1]

On January 13, 1986, the district court enjoined the Secretary from proceeding with the bidding process in Lease Sale 92. Invoking two recent Ninth Circuit decisions construing ANILCA, the court concluded that the Secretary had applied an incorrect legal standard in determining his duties under section 810(a) and accordingly had failed to comply with the notice and hearing requirements in section 810(a)(1)-(3). Specifically, the court held that, notwithstanding the Secretary's finding that subsistence restrictions were unlikely, where a proposed action "may significantly restrict subsistence uses," the Secretary is required to proceed with notice and hearing under the second tier of section 810(a). Memorandum and Order at 2-3, *citing People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984). The district court concluded that appellants had established a strong likelihood of success on their ANILCA claim, and that an injunction was required as a matter of course under *Gambell II*, 774 F.2d at 1422-26.

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[1] Appellants alleged violations of section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1538.

Having granted a preliminary injunction based on appellants' ANILCA claim, the court declined to address the other alleged statutory violations.

II. STANDARD OF REVIEW

Our review of a ruling on a motion for a preliminary injunction is "very limited." *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court," *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982), and will be reversed only for an abuse of discretion or if the decision is based on an erroneous legal standard. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

"To obtain a preliminary injunction, a party must show either 1) a likelihood of success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Apple Computer*, 725 F.2d at 523. Absent unusual circumstances, irreparable damage is presumed and an injunction is required when an agency violates ANILCA section 810(a). *Gambell II*, 774 F.2d at 1422-23.

Because the preliminary injunction rested solely on the district court's interpretation of section 810(a), our review is, as a practical matter, *de novo*.

III. DISCUSSION

The central issue before us can be simply framed: When do the notice and hearing requirements under ANILCA section 810(a) apply? Must the Secretary find that a proposed action "*would* significantly re-

strict subsistence uses?" 16 U.S.C. § 3120(a) (emphasis added). Or is a finding that significant restrictions "*may*" result sufficient, even though such restrictions are deemed unlikely?

The Secretary contends that a finding that a proposed action "would" significantly restrict subsistence uses is required to trigger section 810(a)(1)-(3) notice and hearing procedures. He offers the following arguments in support of his construction: 1) this court's decisions in *Kunaknana* and *Gambell II* do not require compliance with section 810(a)(1)-(3) absent a likelihood of significant restrictions upon subsistence resources, and 2) the Secretary's construction is required by the plain language of the statute and is entitled to judicial deference. We consider these arguments in turn.

A. *Kunaknana* and *Gambell II*.

In *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984), we read section 810(a) as requiring notice and public hearings "if the agency first concludes that the contemplated action *may* significantly restrict subsistence uses." *Id.* at 1151 (emphasis added).

> The inference to be drawn from [the phrase "which would significantly restrict subsistence uses"] is that Congress intended a two-step process: first, the agency determines whether the contemplated action may significantly restrict subsistence use; if it may, the agency must comply with the notice and hearing procedures. This construction of the statute is a reasonable one, relying on the plain meaning of the words of the statute.

Id.

Although the *Kunaknana* court was not called upon specifically to decide when section 810(a)(1)-(3) procedures would be required, its analysis has subsequently formed the basis for a holding in this circuit.

In *People of the Village of Gambell v. Hodel (Gambell II)*, 774 F.2d 1414 (9th Cir. 1985), the Secretary's section 810(a) evaluation indicated that development and production of the proposed lease sale "may significantly restrict subsistence uses in certain areas." *Id.* at 1422. The court held that under *Kunaknana* the Secretary's finding required that he proceed with the notice and hearing procedures under section 810(a)(1)-(3). *Id.*

Moreover, the argument that the Secretary makes here was presented in nearly identical form to the *Gambell II* court:

> Interior has interpreted the language of Section 810 to require a likelihood of a significant restriction to be evident before the procedures of Subsections 810(a)(1)-(3) come into play. Thus, it found here that "given the low probability that oil will be found, these possible restrictions [at the production stage] are not likely to occur, even locally, as a result of the sale" . . . . It also found that significant restrictions on subsistence at the exploration stage "are not likely * * *" . . . .

Supp. ER, Vol. II, Ex. 10, CR 32.

The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistance restrictions, and, on findings not meaningfully different than those here, concluded that the Secretary was required to

comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

B. *Plain Language and Deference to Agency Interpretation*

The Secretary next urges that his interpretation of section 810(a)(1)-(3) is required by the plain language of the provision, and, as an agency's interpretation of a statute it is charged with administering, is entitled to a high degree of judicial deference and must be upheld unless unreasonable. Both these arguments might be compelling in the abstract, but because we consider *Gambell II* plainly controlling, they do not alter our conclusion that compliance with section 810(a)(1)-(3) procedures is required before the Secretary may proceed with Lease Sale 92. *See Cubanski, etc. v. Heckler*, No. 85-7123, slip op. at 7, (9th Cir. March 6, 1986) (courts are the final authorities on issues of statutory construction).

CONCLUSION

The district court applied the correct legal standard in concluding that the Secretary must comply with the notice and hearing procedures in ANILCA section 810(a)(1)-(3) when he finds that significant restrictions on subsistence uses are "unlikely." Having identified a probable ANILCA violation, the court did not abuse its discretion in granting a preliminary injunction. AFFIRMED.

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